



## California Supreme Court Upholds Class Action Waivers in Employment Arbitration Agreements; Rules PAGA Waivers are Unenforceable

MSK Alert by [Brett Thomas](#)  
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On June 23, 2014, in a highly-anticipated decision, the California Supreme Court held that class action waivers in employment arbitration agreements are enforceable, but an employee's right to bring a representative action under the Private Attorneys General Act of 2004 (PAGA) cannot be waived. This important decision provides employers with a powerful tool in fighting the onslaught of wage and hour and other employment class action lawsuits.

### Class Action Waivers in Employment Arbitration Agreements Are Generally Enforceable

In *Iskanian v. CLS Transportation Los Angeles, LLC*, Iskanian brought a class action and a PAGA representative action against his employer alleging, among other claims, that it failed to pay overtime and provide meal and rest breaks. The employer asserted that all of Iskanian's claims were subject to individual arbitration pursuant to his arbitration agreement with his employer that waived his right to class proceedings. The issue before the *Iskanian* Court was whether the Federal Arbitration Act (FAA) preempts a California rule – established in *Gentry v. Superior Court* – that generally prohibits the enforcement of class action waivers in employment arbitration agreements.

In ruling on this issue, the *Iskanian* Court had to determine whether its prior ruling in *Gentry* had been overturned by the United States Supreme Court's decision in *AT&T Mobility v. Concepcion*. The Court in *Concepcion* held that class action waivers in consumer contracts are enforceable, finding that the FAA preempted a prior California Supreme Court decision invalidating such waivers. *Concepcion* further held that the FAA prevents states from mandating or promoting procedures that are incompatible with arbitration. Because class-wide arbitration interferes with the fundamental attributes of arbitration of informal, efficient, and streamlined proceedings, the Court found that mandating the availability of class arbitration in consumer contracts was contrary to the FAA's purposes. After *Concepcion*, the continuing validity of the *Gentry* rule was unclear.

In *Iskanian*, the California Supreme Court resolved the issue in holding that class action waivers in employment arbitration agreements are enforceable, pursuant to the reasoning set forth in *Concepcion*. The Court rejected the plaintiff's argument that *Gentry* was still applicable because it protects an employee's ability to vindicate unwaivable statutory rights. Rather, the Court ruled that class action waivers are enforceable even in situations where an individual action would be an ineffective means for pursuing statutory employment claims.





## **PAGA Representative Claims Cannot Be Waived**

The arbitration agreement at issue in *Iskanian* also required a waiver of so-called “representative” actions under PAGA. PAGA authorizes representative actions whereby an aggrieved employee acts as a “private attorney general” on behalf of the government and initiates legal action against an employer to recover civil penalties for Labor Code violations allegedly committed against the plaintiff and other employees.

The *Iskanian* Court held that employment arbitration agreements that waive an employee’s right to bring representative PAGA claims are contrary to public policy and unenforceable as a matter of California law. The Court found that despite the *Concepcion* decision, the FAA does not preempt the California prohibition against PAGA waivers, as the FAA was intended to apply only to private disputes, not to PAGA disputes which are brought on behalf of the public.

## **Class Action Waivers Do Not Violate the NLRA**

The *Iskanian* Court also rejected the plaintiff’s reliance on a prior decision by the National Labor Relations Board, *D.R. Horton*, which held that a class action waiver in an employment arbitration agreement violates the National Labor Relations Act (NLRA). The Court held that the NLRA’s general protection of employees’ right to engage in concerted activity cannot be construed as barring class action waivers. However, the Court clarified that the NLRA may be violated if an employment arbitration agreement causes employees to believe that they are precluded from filing a charge with the Board.

## **MSK Submits Comments on Proposed CFRA Regulations**

Earlier this month, MSK attorney Brett Thomas submitted written comments to the California Fair Employment and Housing Council (FEHC) regarding its proposed amendments to the regulations interpreting the California Family Rights Act (CFRA). Modeled after the federal Family and Medical Leave Act, the CFRA authorizes eligible employees to take up to 12 weeks of leave for certain purposes, including leave for an employee’s serious health condition. Ms. Thomas urged the FEHC to revise certain proposed regulations to provide more protection to employers, to clarify employer obligations under the CFRA and to eliminate inconsistencies between the CFRA and federal law.

## **ASK MSK**

**Q: What actions should employers take in light of *Iskanian*?**

A: Employers can limit exposure to class action claims by entering into arbitration agreements with employees that include express class action waivers, but the agreements should not include a waiver of PAGA representative actions.



**Q: What potential liabilities may be assessed against an employer under PAGA?**

A: Under PAGA, the employer may be liable for a civil penalty of \$100 for the initial Labor Code violation and \$200 for subsequent or willful violations, per employee and per pay period. In addition, prevailing employees are entitled to recover their attorneys' fees and costs. PAGA actions are subject to a one-year statute of limitations. Significantly, when an employee brings a claim under PAGA, 75% of any settlement or recovery goes to the state, rather than the claimant.

**Q: What is the continuing effect, if any, of *D.R. Horton*?**

A: *D.R. Horton* still retains precedential authority in actions before the National Labor Relations Board. If an employee challenges a class action waiver by filing a claim with the Board, the Board most likely will apply *D.R. Horton* to find that the employer has committed an unfair labor practice. The Board typically will order an employer to revoke its class action waiver and post a notice of its violation of the NLRA.

